

significantly less burdensome alternatives that would accomplish the same purpose. For example, the Commission could tighten up its enforcement of its milestones for the financing and construction of satellite systems. Such a rule would have the added effect of treating all parties in the same manner, unlike the elimination of the two stage financial showing. The Report and Order fails to analyze any such alternatives that could lessen the impact of this rule change on smaller satellite entities.

**III. THE TWO STAGE FINANCIAL QUALIFICATION PROCESS IS NECESSARY TO OFFSET THE DISPROPORTIONATE BURDEN THE COMMISSION'S FINANCIAL QUALIFICATION RULES IMPOSE ON SMALLER, SELF-FUNDED ENTITIES**

The Commission should not eliminate the two stage financial qualification process because it is the only rule that offsets the inherent advantage the Commission's rules give to larger, self-financed entities over small, externally-financed entities. The Report and Order purports to equalize the qualifying process for all applicants by applying the single stage financial qualification process to all parties. In reality, the Commission's rules prescribe two extremely different financial qualification processes for the two types of applicants.<sup>7</sup>

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<sup>7</sup>See 47 C.F.R. section 25.140(d).

According to the Commission's rules, large, self-funded applicants must simply demonstrate "current assets and operating income sufficient" to construct, launch and operate its satellite for one year.<sup>8</sup> In practice, this involves the submission of a balance sheet and a statement by a high corporate officer that management intends to support the proposal. The assets and income are not required to be irrevocably committed to the project. In fact, the Commission has accepted representations from large self-funded applicants that are expressly conditioned on unspecified contingencies.<sup>9</sup>

In contrast, non-self-funded applicants must demonstrate "fully negotiated" loan, equity and grant commitments from external sources. The applicant must specify in detail a number of terms and conditions for each of the agreements on which it is relying. The rules for non-self-funding applicants conclude with a blanket rejection of any financing arrangements "contingent on further performance by either party."<sup>10</sup>

The anomaly arises because the Commission's rules allow a self-funded applicant to build a satellite system relying on funding sources other than those it presented to the Commission to obtain the license. In practice, this allows self-

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<sup>8</sup>Id. at section 25.140(d)(1).

<sup>9</sup>See Orion Petition for Reconsideration, Appendix A, correspondence from Loral Corporation and TRW to the Commission.

<sup>10</sup>Id. at section 25.140(d)(2)(iv).

funded applicants to acquire a license prior to approaching the capital markets for external funding. This gives self-funded applicants an enormous advantage in dealing with lenders and investors.

The real importance of the two-stage financing is that it offsets this inherent advantage enjoyed by large, self-funded entities under the Commission's rules. The two step showing allows smaller companies to acquire at least a construction permit with which to approach external funding sources (as well as to complete the Intelsat consultative process).

In reality, virtually all successful applicants rely on external financing that is not fully negotiated. The Commission's rules set up a false dichotomy between internally and externally financed applicants, for most applicants are externally financed to a significant degree. For the Commission, in effect, to exclude smaller applicants from this process while at the same time openly allowing the largest applicants to take advantage of it imposes an unfair and undue burden on smaller entities.

Short of revamping the Commission's rules on self-funded and non-self-funded applicants, there is little practical way to offset this inequality other than to retain the two-stage financial qualification process. For this reason as well, the Commission should retain its two stage financial qualification process.

#### IV. THE ORDER'S FINAL REGULATORY FLEXIBILITY ANALYSIS FAILS TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT

The Report and Order's Final Regulatory Flexibility Analysis (FRFA) fails to meet the most basic requirements for a FRFA set forth in the Regulatory Flexibility Act of 1980.<sup>11</sup> The FRFA does not make a single specific reference to any of the rules proposed in the Report and Order and how small business concerns were considered in the development of those rules. While the proposed elimination of the two-stage financial qualification process is clearly of interest to any small business satellite provider, the FRFA makes no reference to any of the issues raised in that discussion. More importantly, nothing in the Report and Order's discussion of the elimination of the two-stage financial qualification process attempted to address the issue from a small entity's perspective.<sup>12</sup>

Moreover, the FRFA fails to discuss specifically any "significant alternatives" that the Commission considered that would "minimize any significant economic impact of the rule on small entities" nor did it discuss why any such alternative

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<sup>11</sup>The Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1980), codified at 5 U.S.C. sec. 601, et seq.

<sup>12</sup>The one exception being a tangential reference to how the Commission is "sympathetic to small companies without large corporate parents...." Report and Order at para. 40. Needless to say, the Regulatory Flexibility Act requires agencies to undertake substantive policy analysis, not offer hollow gestures of sympathy.

was rejected, as required by the Regulatory Flexibility Act.<sup>13</sup> In fact, the elimination of the two-stage financial qualification process actually removes the principal alternative designed to reduce the impact of the Commission's rules on smaller entities.

Finally, the FRFA appears to have been mistakenly borrowed from an earlier Commission order (specifically, the Commission's Big LEO Order) and placed in the Report and Order with no changes or edits whatsoever. The two FRFAs are identical save for the paragraph numbers (see attachments A and B). The FRFA in the Report and Order even references "rules that will permit Big LEO systems to be licensed"<sup>14</sup> -- clearly a reference to the wrong set of rules.

## V. CONCLUSION

The two stage financial qualification process has played a crucial role in opening up the satellite services market to smaller competitors. It has succeeded largely in bringing competition to the international satellite market without incurring the risk of misuse of scarce orbital resources through warehousing. The Commission should retain the two part financial qualification process as a part of its newly unified satellite services policy in this docket.

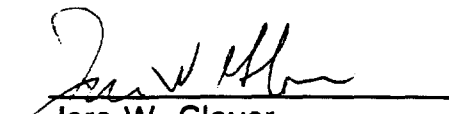
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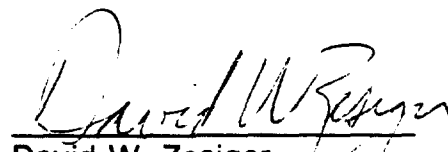
<sup>13</sup>5 U.S.C. section 604(a)(3).

<sup>14</sup>Report and Order at para. 225.

For the foregoing reasons, the Office of Advocacy respectfully recommends the Commission grant the petitions to reconsider its Report and Order in IB Docket No. 95-41 and reject the oppositions filed thereto.

Respectfully submitted,

  
Jere W. Glover  
Chief Counsel

  
David W. Zesiger  
Assistant Chief Counsel

## **A P P E N D I C E S**

## APPENDIX A

FRFA from Report and Order in IB Docket No. 95-41

### IV. Final Regulatory Flexibility Analysis

75. Need for Rules and Objective. We have codified proposed rules that will permit Big LEO systems to be licensed. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

76. Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response those comments.

77. Alternatives that Would Lessen Impact. The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.



#### **IV. FINAL REGULATORY FLEXIBILITY ANALYSIS**

225. Need for Rules and Objective. We have codified proposed rules that will permit Big LEO systems to be licensed. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

226. Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response to those comments.

227. Alternatives that would Lessen Impact. The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

## **CERTIFICATE OF SERVICE**

I, Jeanne K. Bishel, hereby certify that on this 31<sup>st</sup> day of May, 1996, a copy of the foregoing reply of the Chief Counsel for Advocacy of the United States Small Business Administration to Oppositions to Petitions for Reconsideration was served by first class mail, postage prepaid addressed to the following:

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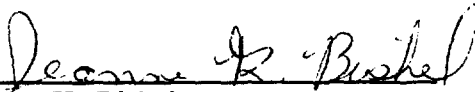
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August 21, 1996

The Honorable Reed E. Hundt  
Chairman  
Federal Communications Commission  
Suite 314  
1919 M Street, NW  
Washington, DC 20554

Dear Chairman Hundt:

I appreciate your reply of July 15, 1996 to my earlier letter regarding Mobile Communications Holdings, Inc. (MCHI) and its Ellipse low-earth orbit mobile satellite system.

I am returning to the issue once more because I want to make very clear how I — and I believe many of my colleagues on both sides of the aisle — view the small business issue as it relates to the Big LEO and other relevant satellite licensing proceedings.

As Section 257 of the Telecommunications Act of 1996 makes clear, we want to see small business market entry barriers removed. This involves not only the formal inquiry procedure the FCC now has underway, which I commend. Its intent is also that you look for ways to interpret the rules you have established in current proceedings so that you remove any market entry barriers to small businesses. That is what I believe the SBA meant in its letter sent to you on April 24, 1996, regarding MCHI and the Big LEO proceeding.

It is not enough to observe, as you do in your letter, that smaller service providers can buy and resell capacity from satellite system operators. That misses the point. The Telecommunications Act mandates the removal of barriers to telecommunications ownership by small businesses. Small businesses should be given access to the market place and allowed to compete.

The stringent financial test applied in the Big LEO situation, which allows some companies to qualify solely on the basis of corporate assets and operating income (even though not committed to the project), strongly favors large, established corporations. That is wrong, unfair and is a market entry barrier for smaller enterprises. The FCC has previously found creative ways to foster small business participating in capital-intensive services, such as PCS, without using stringent financial standards as a bar.

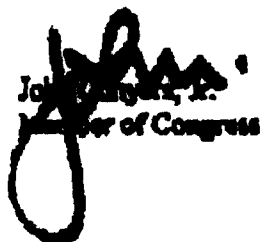
It also bears emphasis that the FCC has historically fostered entrepreneurship and competition in the satellite industry, with resulting benefits to consumers, through more flexible

financial standards which have contributed to the success of companies such as PanAmSat, Orion and Columbia. The Commission's recent reversals of these long-standing and successful policies is even more inexplicable in light of recent legislation, such as the Telecommunications Act of 1996 and the Small Business Regulatory Enforcement Fairness Act of 1996, reaffirming national policies with respect to elimination of regulatory hurdles for small businesses.

I also note that your concerns about "warehousing" are misplaced because there is evidence that adequate spectrum exists to accommodate all of the applicants in the Big LEO proceeding and no new companies have filed applications or otherwise expressed interest in the relevant frequency bands. In addition, the FCC has established construction and implementation milestones for the Big LEO systems which I understand are intended to deal with the warehousing problem.

I hope you will find a way to correct the current inequitable situation. I believe the FCC currently has the authority to do so. I urge you to act accordingly.

Sincerely,

  
John Dingens, Jr.  
Member of Congress

## **CERTIFICATE OF SERVICE**

I, Cristina M. Lirag, hereby certify that a true and correct copy of the foregoing  
"Comments of Columbia Communications Corporation on Notice of Inquiry," was hand delivered  
this 27th day of September 1996 to the following:

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